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No. 80-402

In the Supreme Court of the United States

October Term, 1980

J. P. STEVENS & CO., INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD and AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION, AFL-CIO,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. May the National Labor Relations Board (the Board) deprive an employer of its property rights, as a remedy for bad-faith bargaining which occurred at only a small group of its unionized plants at one location, by ordering that non-employee union representatives be permitted to enter onto company property to solicit employees at each of the employer's 81 plants?

2. May the Board require an employer to give notice and bargain with a union certified as the bargaining representative at one of the employer's locations, prior to the employer announcing or implementing corporate-wide changes in benefits at its unrepresented plants?

3. May the Board order an employer to pay litigation expenses to the Board and litigation and negotiating expenses to a union, as a remedy for violations of the National Labor Relations Act (the Act)?

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In the Supreme Court of the United States

October Term, 1980

J. P. STEVENS & CO., INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD and AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION, AFL-CIO,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, J. P. Stevens & Co., Inc., prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on June 11, 1980.

I. OPINIONS BELOW

The opinion of the court of appeals is reported at 623 F.2d 322.[1] The decision and order of the Board is reported at 239 NLRB No. 95.

1. References to portions of the record, which are reproduced in the Appendix, are designated by their appropriate page numbers, preceded by "A."

II. JURISDICTION

The judgment of the court of appeals was entered on June 11, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

III. APPLICABLE CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment of the United States Constittution provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

Section 7 of the Act [29 U.S.C. § 157] provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 8(a)(5) of the Act [29 U.S.C. § 158(a)(5)] provides:

> It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Section 8(d) of the Act [29 U.S.C. § 158(d)] provides:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

Section 9(a) of the Act [29 U.S.C. § 159(a)] provides:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

Section 10(c) of the Act [29 U.S.C. § 160(c)] provides in pertinent part:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter.

Section 302 of the Act [29 U.S.C. § 186] is included in the Appendix.

Section 303 of the Act [29 U.S.C. § 187] provides:

> (a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(a)(4) of this title.
>
> (b) Whoever shall be injured in his business or property by reason or [sic] any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

IV. STATEMENT OF THE CASE

The petitioner is a Delaware corporation with its principal office in New York, New York, and is engaged in the manufacture of textile and textile-related products at 81 plants located in New England and throughout the Southeastern United States.

This case arose at the petitioner's seven plants located in Roanoke Rapids, North Carolina. Pursuant to a Board-conducted election, the Textile Workers Union of America, AFL-CIO (the union) was certified as the representative of the Roanoke Rapids employees on September 6, 1974. During the period from September 16, 1974 through November 11, 1976, the parties participated in 60 formal negotiating sessions. The Board found that during these

negotiations the petitioner bargained in bad faith in violation of § 8(a)(5) of the Act. In addition to imposing the traditional bargaining remedies (A131), the Board ordered the following extraordinary remedies:

> 1. Authorization for union representatives to enter onto company property at each of the petitioner's 81 plants for purposes of soliciting employees in the canteens and rest and other nonwork areas, including parking lots, for a period of two years;
>
> 2. Authorization for union representatives to enter onto company property at each of the petitioner's 81 plants for the purpose of attending company meetings with employees where the question of union representation is addressed, with the right of equal rebuttal time for one of the union representatives present at the meeting, for a period of two years;
>
> 3. Authorization for union representatives to enter onto company property at each of the petitioner's 81 plants for the purpose of delivering a 30-minute speech to employees on working time, in any case where the Board schedules an election in which the union participates, for a period of two years; and
>
> 4. Authorization for union representatives to enter onto company property at each of the petitioner's 81 plants for the purpose of using plant bulletin boards, for a period of one year (A136).

In addition, the Board imposed on the petitioner an unprecedented bargaining obligation, *i.e.*, to give notice and bargain with the union at its Roanoke Rapids plants before announcing or implementing corporate-wide changes in benefits at its unrepresented plants (A4). Finally, the Board ordered the petitioner to reimburse the Board for its litigation expenses and the union for its litigation and negotiation expenses (A136).

On review, the Fourth Circuit Court of Appeals affirmed the Board's finding that the petitioner had bargained in bad faith (A145).[2] With respect to the extraordinary remedies involving the entry of union organizers onto company property and the imposition of an expanded bargaining obligation on corporate-wide benefit changes, the court perfunctorily deferred to the Board's discretion in fashioning remedies (A146-148). It remanded the issues relating to the reimbursement of litigation and negotiation expenses, because of an "ambiguity" between prior Board precedent regarding reimbursement and the Board's justification for reimbursement in the instant case (A150-152).

V. REASONS FOR GRANTING THE WRIT

A. The extraordinary access remedies ordered by the Board are not designed to undo the effects of the violations and do not adequately protect the legitimate interests of the petitioner

While this case standing alone raises significant questions regarding the appropriate application of the Nation's labor laws, this petition should also be viewed as a companion case to the pending petition for a writ of certiorari in *J. P. Stevens & Co., Inc. v. NLRB,* No. 79-1637, docketed on April 23, 1980. In that case, the Board imposed identical remedies which licensed union organizers to enter onto company property at each of the petitioner's plants. In fact, the Board order in Docket No. 79-1637 imposed such extraordinary remedies "for the reasons set forth" in its decision in the instant case. Thus, with respect to this issue, the instant proceeding is the seminal case.

As discussed fully in the petition for a writ of certiorari in Docket No. 79-1637, Board orders issued pursuant

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2. The review by the court of appeals was pursuant to 29 U.S.C. §§ 160(e) and (f).

to § 10(c) of the Act must satisfy two fundamental principles: (1) the remedy must be designed "to undo the effects of the violations of the Act;"[3] and (2) the remedy must adequately protect the legitimate interests of the employer.[4] Punitive remedies are prohibited. *See Republic Steel Corporation v. NLRB*, 311 U.S. 7 (1940); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 236 (1938). It is clear that the Board and the court of appeals abided by these mandates no more in this case than they did in Docket No. 79-1637.

The violations found to exist in the instant case occurred at the petitioner's seven unionized plants in Roanoke Rapids, North Carolina, and were limited to the bargaining between the parties at that location. Yet as the administrative law judge acknowledged, the remedies permitting union organizers to enter onto the petitioner's property at all of its plants were admittedly "addressed to the union's *organizational* problems in communicating with the employees" (A124) (emphasis added). The opinion of the Fourth Circuit enforcing such requirements as a remedy for *bargaining* violations is in direct conflict with the decision by the Fifth Circuit in *Florida Steel Corp. v. NLRB*, 620 F.2d 79 (5th Cir. 1980). In that case, the Board ordered that the union be granted access to company property at both the represented and unrepresented plants of the employer as a remedy for certain bargaining violations,[5] on the grounds that the case "is yet

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3. *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 316 (1979).

4. *Id.*

5. The Board-ordered remedies in *Florida Steel* provided that union representatives be afforded the right to deliver a 30-minute speech to employees on company time at any of the employer's plants where the Board scheduled an election within a two-year period, and be granted equal time to rebut any address on the question of union representation made by employer representatives to employees on company property. 620 F.2d at 81.

another step in what can only be characterized as a corporate campaign to chill employee organizational activity throughout its facilities through unlawful conduct . . . [and] . . . because of [the employer's] history of interference with employee rights during organizational campaigns and even after employees have selected a union to represent them . . . ." 242 NLRB No. 195, 101 LRRM 1370, 1371.[6] The Fifth Circuit rejected the imposition of such an extraordinary remedy at the employer's unrepresented plants,[7] stating as follows:

> In requiring this access to be provided at plants where the Steelworkers union is not a bargaining representative . . . the Board's order cannot be viewed as remedial with respect to the charge before it, one involving interference with the union's performance of its role as a bargaining representative. Whether such access might be properly ordered in other circumstances, *e.g.*, in connection with a charge for violations in connection with multi-plant organizational efforts, is a matter not before the court. *But see J. P. Stevens & Co., Inc. v. NLRB*, 612 F.2d 881 (4th Cir. 1980)

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6. *Florida Steel* has been found guilty of unfair labor practices by the Board on 17 separate occasions since 1974, with enforcement ordered by the court in 10 of the 12 cases reviewed on appeal. *Florida Steel Corp. v. NLRB*, 620 F.2d at 82, note 5.

7. The court held that the imposition of the remedies at the company's two union plants was justified, "albeit tenuously, as a means of deterring any repetition of the conduct before the Board and for preventing other efforts by the company to impair the effectiveness of the union as a bargaining representative." 620 F.2d at 83.

The imposition of such a remedy limited to the petitioner's Roanoke Rapids plants is uncalled for in the instant case since the union has already been provided with such a remedy at Roanoke Rapids, as well as all other plants of the petitioner in North and South Carolina, for a two-year period after the occurrence of the violations found to exist in the instant case. *See NLRB v. J. P. Stevens & Co., Inc.*, 563 F.2d 8, 24 (2nd Cir. 1977) (contempt).

> *enf'g*, 240 NLRB No. 35 (1969) [now pending before this Court in Docket No. 79-1637]. Suffice it to say, the Board has in this particular portion of its order —perhaps from understandable frustration and impatience—imposed a requirement which cannot be sustained, even in the light of the prior derelictions by Florida Steel. This is particularly so in view of the other provisions of the order, which we are upholding, which call for notice to be given to employees throughout the company of the action taken on this unfair labor practice. 620 F.2d at 83.

Florida Steel cannot be distinguished from the instant case. Indeed, the Board has imposed upon the petitioner in the instant case far more severe extraordinary remedies than were imposed in *Florida Steel*, which *were* directed to the bargaining violations which the petitioner does not now contest,[8] and the access remedies imposed by the Board in the instant case are much more far-reaching than those imposed in *Florida Steel*. Permitting union organizers to enter into the canteens, parking lots and other non-work areas of the petitioner's non-union plants, to make speeches to those employees on the merits of forming their own union and according those organizers the privilege of responding to the employer's comments on the subject—*because of what happened at the bargaining table at a single unionized location*—is patently punitive.

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8. In addition to the usual remedies, the Board entered a *corporate-wide* cease and desist order (A132) and ordered the petitioner to: post notices at each of its plants, signed by its president and chairman of the board, as well as each of the other members of the board of directors, and by the highest managerial official of the plant; mail copies of the notice to the home of each of its employees at all of its plants, together with a letter dictated for the employer by the Board; read, or to permit a Board agent to read, the notice to assembled employees at each of its plants during working time (A134); and include a copy of the notice and the Board-dictated letter in appropriate company publications, such as employee newsletters (A3).

The imposition of such harsh remedies is likewise improper because the remedies deprive the petitioner of its property rights, without even the slightest acknowledgement by the Board or the court of appeals that constitutionally protected rights are being withdrawn. This failure to even discuss the property rights of the petitioner is clearly in direct contravention of the repeated admonitions of this Court.[9] As this Court has specifically held, the property rights of an employer may not be infringed upon, absent a showing that such constitutional rights are outweighed by the rights of employees to receive organizational information, *NLRB v. Babcock & Wilcox*, 351 U.S.

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9. Regarding the Board's tendency to disregard the property rights of employers in granting access to union solicitors, recent remarks of the immediate former general counsel of the Board are incisive. Referring to the treatment afforded an employer's property rights by the Board in *Scott Hudgens*, 230 NLRB 414 (1977), following this Court's remand, *Hudgens v. NLRB*, 424 U.S. 507 (1976), he observed:

> From the Board's analysis in *Hudgens*, then, one could predict that future cases would be decided by rubric concluding that Section 7 rights outweigh private property interests rather than careful analysis of competing interests or alternative means available to the union and the employees.
>
> * * *
>
> Without belaboring the point, I suggest that the Board is misreading *Hudgens, Babcock & Wilcox* and *Central Hardware* in order to ensure union and employee access to employer premises. More is needed than to merely conclude that the activity sought to be carried out on employer premises is "protected," and the availability of alternative means of access is an important element in the equation. The Board seems to be ignoring the Supreme Court's discussion of the access issue in *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180 (1978).
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> * * *
>
> Once again, why are these cases of practical importance? The main reason, as I see it, is because it is a small jump from union access to the parking lot of [a] free-standing store to the parking lot of virtually any plant. If the law is to be changed, it should not be done by overreaching the Supreme Court's decision in *Hudgens*. It should be done by amending the Act which as you all know was attempted and failed.

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105 (1956), and the "[a]ccommodation between the [employer's property rights and the employees' organizing rights] must be obtained with as little destruction of one as is consistent with the maintenance of the other." 351 U.S. at 112. *See Eastex, Inc. v. NLRB,* 437 U.S. 556, 570-71 (1978); *Sears, Roebuck & Co. v. San Diego District Council of Carpenters,* 436 U.S. 180, 205-07 (1978); *Hudgens v. NLRB,* 424 U.S. at 521.

There is a serious question whether *Babcock & Wilcox* can be expanded to include any cases other than those where the physical design of the employer's facilities, or the residences of the employees to be reached, require that employees be permitted to meet with union organizers on the property of their employer. As the court stated in *Babcock & Wilcox*: "When the inaccessibility of employees makes ineffective the reasonable attempts by non-employees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize." 351 U.S. at 112. *See Sears, Roebuck & Co. v. San Diego District Council of Carpenters,* 436 U.S. at 205-07; *Central Hardware Co. v. NLRB,* 407 U.S. 539, 544-45 (1972).

Moreover, even assuming that *Babcock & Wilcox* can be interpreted to permit the Board to order the entry of union organizers onto company property as a remedy for unfair labor practices, as distinguished from the purposes outlined in *Babcock & Wilcox,* the Board was required to articulate a standard defining the circumstances under which such remedies are appropriate. It seems abundantly clear that if the Board's order in the instant case is permitted to stand, this petitioner and all other employers subject to the Board's jurisdiction can only guess as to the circumstances which will next cause the

Board to issue a summary edict that union organizers be permitted to invade their property.

The Supreme Court has never before considered the novel and important question of whether the Board has the authority to deny an employer its property rights by permitting union organizers to enter its plants *as a remedy for unfair labor practices*, and a failure to grant a writ in this case and in Docket No. 79-1637 will virtually license the Board to continue to deny employers their constitutional property rights.

B. The Board may not require an employer to bargain with a union prior to changing benefits for unrepresented employees

During the bargaining period dealt with in the Board decision, the petitioner instituted corporate-wide changes in its profit sharing plan, group insurance and wage rates (on two occasions) (A42). In each instance, at the time the petitioner made a general announcement to its unrepresented employees concerning the contemplated change, it simultaneously advised the union at Roanoke Rapids of its actions and offered to bargain with the union concerning the possibility of such a change for represented employees. In each instance, bargaining ensued and an agreement was ultimately reached for the implementation of the identical benefit for represented employees which the petitioner unilaterally granted unrepresented employees. In some instances, the union agreed to the suggested benefit change on the very day it was offered, *i.e.*, the profit sharing floor and the 1975 wage increase, and in other instances agreement came only after lengthy bargaining, *i.e.*, the 1976 wage increase and group insurance changes. But in every instance, the benefit was placed into effect for represented employees no later than it was placed into effect for unrepresented

employees, and accompanying all such changes was a clear understanding by the parties that its implementation would not estop the union from pressing for more during later bargaining.

The union was not undermined at Roanoke Rapids as a result of this bargaining strategy. Each time the parties negotiated an impressive new fringe benefit or made a significant upward adjustment in wage rates, there followed either a joint announcement to Roanoke Rapids employees that the improvement resulted from bargaining between the parties or the union was left on its own to unilaterally "triumph a victory" through bargaining, without any diluting comments by the petitioner.

The Board concluded that the petitioner bargained in bad faith concerning the benefit changes because its "bargaining strategy thus confronted the union with a 'Hobson's choice' " (A3), even though it was acknowleged that "[i]n all four pleaded 'Hobson's choice' situations, [the petitioner] did not in fact tell the union it had to choose between 'agreeing to the announcement' of the benefit or 'rejecting such benefits.' The record indicates that [the petitioner] gave the union to understand that it was making the announcement at the unorganized plants and that it would be willing to do the same at Roanoke Rapids or, in the alternative, would hold the announcements. On each such occasion, . . . the union understood [the petitioner] to be implying that it was willing to discuss the prospective improvements with the union" (A42-43).

To remedy this alleged violation, the Board ordered the petitioner to "[g]ive prompt notice to the union of Respondent's decision to announce or institute system-wide changes in employee benefits; produce upon request all information relevant thereto for purposes of collective

bargaining, prior to announcement or implementation of such changes in benefits on a company-wide basis; and afford the union an opportunity effectively to negotiate regarding similar or identical contemplated changes in such employee benefits for the bargaining unit at the Roanoke Rapids plant" (A4).

The imposition of such an unprecedented remedy far exceeds the Board's authority to oversee the collective bargaining process. It is axiomatic that the provisions of §§ 8(a)(5), 8(d) and 9(a) of the Act only require an employer to bargain with a union *as to the employees it has been certified to represent.* As this Court held in *Allied Chemical and Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 164 (1971):

> Together, these provisions establish the obligation of the employer to bargain collectively, "with respect to wages, hours, and other terms and conditions of employment" with "the representatives of his employees" designated or selected by the majority "in a unit appropriate for such purposes." *This obligation extends only to the "terms and conditions of employment" of the employer's "employees" in the "unit appropriate for such purposes" that the union represents.* (Emphasis added).

In cases where a union represents only a portion of the employees of an employer, the employer remains free to add benefits for unrepresented employees without doing the same for represented employees, even if the motive of the employer is to put pressure on the union to accept the collective bargaining contract offered by the employer. For example, in *McGraw Edison Co.*, 172 NLRB 1604 (1968), the Board held that an employer did not violate § 8(a)(5) when it improved wages and benefits at its unrepresented plants while withholding such added im-

provements at its one facility where bargaining was taking place. In finding no violation, the Board held:

> While the timing and manner in which the Company put increased benefits into effect at its unorganized plants served to underline the Company's position that its employees did not need a union to obtain wage increases and other benefits, it does not follow . . . that the Company evinced bad faith in the . . . negotiations by withholding these benefits from the [represented] employees until a contract could be agreed upon. The Company's conduct to be sure had the effect of putting pressure on the Union to accept its contract proposals, but such pressure is not of itself unlawful. *Id.* at 1609-10.

Accord, McCulloch Corp., 132 NLRB 201, 213-14 (1961) (where the Board held that the employer did not violate the Act by notifying unrepresented employees of a wage increase and increased benefits to be effective in five days and simultaneously proposing the same increases to the union); *Shell Oil Co.*, 77 NLRB 1306, 1309-10 (1948).

It is clear that the Board order in the instant case is designed to alter the balance between a strong employer and a weak union, by imposing a remedy which will give the union an organizational and bargaining advantage by allowing it to claim credit for benefit changes at the unrepresented plants. This is done as a result of the Board ordering that the petitioner advise the union of its intention to place a corporate-wide benefit into effect at its non-union plants, and furnish the union with all desired relevant information concerning the change, *before the employer is free to announce or implement the change in benefits at its unrepresented plants.* The Board does not possess the authority to inject itself so deeply into the bargaining process. *See American Ship Building Co. v. NLRB*, 380 U.S. 300, 317-18 (1965).

It is equally clear that the Board order relating to corporate-wide benefit changes amounts to an attempt to require the petitioner to *agree* on particular issues during negotiations at Roanoke Rapids. The Board accomplishes this objective by ordering that the petitioner negotiate at its union plants on any benefit change it contemplates for unrepresented employees. The imposition of such a remedy clearly contravenes the express provision of § 8(d) of the Act which states that the duty to bargain "does not compel either party to agree to a proposal or require the making of a concession." As this Court held in *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 107-08 (1970):

> It is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties. The Board's remedial powers under § 10 of the Act are broad, but they are limited to carrying out the policies of the Act itself [footnote omitted]. *One of these fundamental policies is freedom of contract.* (Emphasis added).

Whether an employer chooses to offer a benefit at the bargaining table is not controlled by the employer's actions at its unrepresented plants.

This case raises important questions regarding the extent, if any, to which the Board may limit the exercise of normal management prerogatives at unrepresented plants through the exercise of the Board's jurisdiction to oversee the bargaining process at represented plants of the employer. This Court has never directly addressed this vital issue in labor relations, and the instant case presents an ideal factual setting for a consideration of the point. The unprecedented approach to this issue by the Board raises serious and far-reaching questions con-

cerning the Board's authority to alter the relative bargaining positions of the parties to a negotiation and amounts to an insistence that an employer take bargaining positions which the Board—rather than the employer—considers to be reasonable and fair. Such a deep penetration by the government into the bargaining process strikes directly against the statutory scheme of *free* collective bargaining, and must not be permitted to stand.

C. The award of litigation and negotiation expenses is contrary to public policy and beyond the Board's statutory authority

The Board ordered the petitioner to reimburse the union and the Board for litigation expenses incurred in the investigation, preparation, presentation, and conduct of this proceeding before the Board, and to pay the union the costs of participating in the collective bargaining negotiations (A136). The Fourth Circuit remanded this issue to the Board, in view of the apparent conflict between the standard applied in this case and other prior Board decisions (A152-153). The petitioner seeks review of this issue on the ground that the imposition of such remedies is not appropriate under any state of facts.

The exclusive source of the Board's authority to impose remedies is § 10(c) of the Act. *See Republic Steel Co. v. NLRB, supra.* Nowhere in § 10(c) is there any provisions for attorney's fees.[10]

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10. Section 303 of the Act provides for recovery of damages incurred as a result of a violation of § 8(b)(4) of the Act, and recovery of "the cost of the suit." Even this language has been repeatedly held insufficient to justify an award of attorney's fees in a § 303 action. *See, e.g., F.F. Instrument Corp. v. Union De Tronquistas,* 558 F.2d 607 (1st Cir. 1977); *Mead v. Retail Clerks Int'l Ass'n,* 523 F.2d 1371 (9th Cir. 1975); *Refrigeration Contractors, Inc. v. United Association of Journeymen and Apprentices,* 501 F.2d 668 (5th Cir. 1974).

The "American rule" is to deny attorney's fees to a prevailing party except under very limited circumstances, and when Congress makes an exception to this rule it does so with "specific and explicit" provisions. *Alyeska Pipe Line Service Co. v. The Wilderness Society,* 421 U.S. 240, 261 (1975).[11] The absence of any statutory authorization establishes that Congress did not intend to provide for recovery of attorney's fees by the prevailing party in any matters adjudicated by the Board. This conclusion is bolstered by the fact that for the first 37 years after the enactment of the Act, and until the Board's decision in *Tiidee Products, Inc.,* 194 NLRB 1234 (1972), the Board never once awarded litigation expenses to a party.[12] In the eight years since the Board's turnabout in *Tiidee Products, Inc., supra,* the Board has awarded litigation expenses seven times. *Wellman Industries,* 248 NLRB No. 29 (1980); *J. P. Stevens & Co., Inc.,* 247 NLRB No. 44, *appeal docketed,* Nos. 80-7053, 80-7247 (5th Cir., January 22, 1980); *J. P. Stevens & Co., Inc.,* 244 NLRB No. 82, *appeal docketed,* No. 79-1502 (4th Cir., August 29, 1979); *Koval Press,* 241 NLRB No. 189 (1979); *J. P. Stevens & Co., Inc.,* 239 NLRB No. 95 (1978) (the instant case); *Tiidee Products, Inc.,* 196 NLRB 158 (1972); *Tiidee Products, Inc.,* 194 NLRB 1234 (1972). On only one occasion has a court of appeals upheld a Board order awarding litigation expenses, *Int'l Union of Elec. Workers v. NLRB,* 502 F.2d 349 (D.C. Cir. 1974), *cert. denied,* 417 U.S. 921, and that court relied upon an earlier circuit court opinion since reversed by this Court. *See*

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11. In contrast to this statute, federal labor laws which contemplate recovery of attorney's fees are specific in so providing. *See, e.g.,* Fair Labor Standards Act, as amended, § 16(b), 29 U.S.C. § 216(b); Civil Rights Act of 1964, as amended, § 706(k), 42 U.S.C. § 2000e-5(k); Railway Labor Act, § 3(p), 45 U.S.C. § 153(p).

12. The reasons advanced by the Board for rejecting claims for attorney's fees prior to *Tiidee Products, Inc.* were well expressed in *Heck's, Inc.,* 191 NLRB 886 (1971).

Food Store Employees v. NLRB, 476 F.2d 546 (D.C. Cir. 1973), *rev'd*, 417 U.S. 1 (1974). It is the position of the petitioner that the ruling in *Electrical Workers* is erroneous and directly violates § 302 of the Act which generally prohibits payments by an employer to a union. The Board recognized this obstacle to the award of any type of expenses to a union in *Heck's, Inc.*, 191 NLRB at 889, where it stated:

> A request for reimbursement for lost dues and fees also raises a statutory question relating to the applicability of Section 302, which deals with restrictions on payments by employers to employee representatives.

The awarding of attorney's fees is likewise inconsistent with the statutory scheme. Specifically, since the primary purpose of the Act is to balance the rights of those who favor unionization with the rights of those opposed, *American Ship Bldg. Co. v. NLRB, supra,* and since there is no provision in either statutory or case law for recovery of fees by an employer required to deal with a frivolous charge, it is inappropriate to read § 10(c) as disturbing the balance of the Act by allowing an award of litigation expenses to the Board and the union. *Int'l Union of Elec. Workers v. NLRB*, 502 F.2d at 353.[13] The awarding of attorney's fees to the government agency charged with the responsibility of enforcing the Act is also directly contrary to this Court's decision in *Republic Steel Co. v. NLRB, supra* (where this Court struck down a Board order which required a company to reimburse certain government

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13. Individual comments by Judge McKinnon, who, acknowledging that the panel was bound by the precedent in *Food Store Employees v. NLRB, supra*, essentially details the error in his own majority's decision. Subsequent to Judge McKinnon's persuasive comments in *Int'l Union of Elec. Workers v. NLRB*, the decision in *Food Store Employees v. NLRB*, was reversed on other grounds, with this Court pretermitting the issue of litigation expenses. *NLRB v. Food Store Employees, supra.*

agencies who had paid wages to employees subsequent to their discharge but prior to the Board order requiring the employees reinstated with back pay).

Because the Board has no authority to award litigation expenses, for even stronger reasons it has no authority to enter the unprecedented remedy of awarding negotiating expenses to a union.

VI. CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued.

Respectfully submitted,

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